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91-2080

Supreme Court, U.S.
FILED
JUN 17 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD M. PACHULSKI,
Petitioner,

v.

TOPA THRIFT and LOAN ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 16, 1992

QUESTIONS PRESENTED

1. May a district court provide by local rule that a party who fails to file opposition to a motion for summary judgment may be deemed to have consented to granting of the motion?

    (a) May a district court grant a motion for summary judgment based on violation of local rule (failure to file opposition on time) without determining if the moving papers establish the non-existence of a triable issue of material fact?

2. May a district court disregard a party's opposition to a summary judgment motion filed two weeks prior to the hearing date, but one week after stipulated time, due to illness of counsel and engagement of counsel in trial in another matter, and engagement in preparation of oppositions to summary judgment in two other matters?

3. Is illness of counsel and engagement in trial excuse sufficient to vacate a summary judgment entered because of a party's failure to timely file written opposition?

PARTIES TO THE PROCEEDING

Richard M. Pachulski

Topa Thrift and Loan Association

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No. _____

RICHARD M. PACHULSKI,
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TOPA THRIFT and LOAN ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Richard M. Pachulski, respectfully requests that a writ of certiorari issue to review the judgment and memorandum decision entered in this proceeding in the Ninth Circuit of Appeals on December 13, 1991.

OPINION BELOW

The opinion of the Court of Appeals is unreported, and was rendered in the form of a Memorandum. The Memorandum decision filed on December 13, 1991 appears in the Appendix at 1a - 5a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth

Circuit was filed on December 13, 1991. The petition for rehearing was denied by order filed March 19, 1992. (See Appendix at 6a.) The jurisdiction of this Court is invoked pursuant to the provisions of 28 *U.S.C.* §1254(1).

STATUTES INVOLVED

This case involves the application of *Federal Rules of Civ. Proc.*, Rule 56(c), Rule 60(b)(1), (6), and Local Rules of the United States District Court for the Central District of California, Rules 7.9 and 7.14.2. These provisions are reproduced in the Appendix at 7a - 10a.

STATEMENT OF THE CASE

(a) Basis for federal jurisdiction in the court of appeals.

This action was instituted in the United States Bankruptcy court for the Central District of California as an original Chapter 11 proceeding styled In re: Douglas D. Gross, debtor, Case No. BKRLA-83-18098-BR, and was converted to a Chapter 7 proceeding. Petitioner Richard M. Pachulski is the trustee in bankruptcy, and filed adversary proceeding no. LA85-0808-BR under the aforementioned bankruptcy case. The bankruptcy court referred the adversary proceeding to the United States District Court for the Central District of California, for jury trial. Jurisdiction of the district court was based upon 28 *U.S.C.* §1334, which grants original district court jurisdiction over all bankruptcy cases under Title 11, in all civil proceedings arising under Title 11. (See *In re Adams*, 761 F.2d 1422 at 1424-1425 (9th Cir. 1986). See also, 11 *U.S.C.* §105(a) [bankruptcy court has power to issue any order, process or judgment necessary or appropriate to carry out the provisions of Title 11]; and, 11 *U.S.C.* §704 [trustee in chapter 7 shall collect and reduce to money the property of the estate for which the trustee serves].)

The district court entered a final judgment after the grant of summary judgment in favor of respondent. The judgment was entered February 8, 1990; Petitioner's notice of appeal in Ninth

Circuit Court of Appeals case no. 90-55283 [appealing from the order granting summary judgment] was filed February 13, 1990. The order denying petitioner's motion to vacate judgment was entered April 20, 1990, and the appeal therefrom, resulting in Ninth Circuit Court of Appeals case no. 90-55686, was filed May 17, 1990. The appeals were timely under *Federal Rules of Appellate Procedure*, Rule 4(a)(1) and under 28 *U.S.C.* §1291. The appeals were later consolidated.

(b) Factual background and relevant procedural history

This Petition arises from the grant of summary judgment in an adversary proceeding filed in a Chapter 7 bankruptcy case which was referred by the bankruptcy court to the district court for jury trial.

Respondent answered the complaint, and later moved for summary judgment, with a hearing date scheduled for December 4, 1989. On November 16, 1989 the parties stipulated (and the court ordered) that the hearing on the motion for summary judgment was continued to January 16, 1990; Petitioner's opposition to the motion was due no later than December 26, 1989; and, Respondent's reply was due no later than January 8, 1990. The pre-trial and trial were also continued. Among the reasons for this continuance were that Petitioner's counsel was scheduled for trial commencing November 20, 1989, counsel was also to be unavailable between December 22, 1989 and January 2, 1990, and counsel's offices were closed for business between December 23, 1989 and January 2, 1990.

On December 27, 1989, Petitioner filed an Ex-Parte Application to File Late Opposition to the Motion for Summary Judgment. The reasons for this were, first, that the trial set to commence November 20, 1989, did not commence until November 27, 1989, and ended with a jury verdict on December 12, 1989. Second, after commencement of trial and after having been served with the summary judgment motion in this case, Petitioner's counsel was served with a motion for summary judgment in another district

court case pending in the Central District of California before Judge Whelan. Opposition to that motion was due on December 21,1989, requiring counsel for appellant to attend to that matter before opposition was due on December 26,1989 in this case in the court below. Third, counsel for appellant was served with a summary judgment motion in a third case. The last day to file opposition in that case was also December 21, 1989, requiring counsel to attend to that matter prior to the due date of the opposition in this case in the court below.

Fourth, prior to the time opposition to the summary judgment motion in this case was due, counsel became ill, which prevented him from preparing opposition to the summary judgment motion in this case in the trial court.

Petitioner's Statement of Facts, Memorandum of Points and Authorities in Opposition to Motion for summary Judgment, Objection to Evidence, Declaration of Louis G. Fazzi in Opposition to Motion for Summary Judgment and Statement of Genuine Issues in Opposition to Motion for Summary Judgment, were filed January 2,1990, two full weeks before the scheduled hearing date.

Appellant's Ex-Parte Application of December 27,1989 was denied on January 4,1990. On January 8,1990, Petitioner filed an Ex-Parte Application for an Order Permitting Enlargement of Time to File Opposition to Motion for Summary Judgment. That Application was denied on January 11,1990, in the Order Granting Summary Judgment. (See appendix at 17a.). The Summary Judgment was granted, and the judgment was entered February 8, 1990. Appellant filed a Notice of Appeal February 13, 1990.

On February 26, 1990, appellant filed a Notice of Motion and Motion to Vacate Judgment. The Motion was denied by an order entered April 20,1990.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court of Appeals' memorandum decision (Appendix at 1a) failed to consider or review the substantive issues in the case. Instead, as the district court had done (see order granting motion for summary judgment, Appendix at 11a), the Ninth Circuit Court of Appeals held that the district courts have the authority to make local rules "not inconsistent" with the federal

rules of civil procedure pursuant to *Federal Rules of Civil Procedure*, Rule 83, and Local Rule 7.9, which provides in relevant part "[p]apers not timely filed by a party . . . will not be considered and may be deemed by the Court consent to the granting or denial of the motion". It was argued in the trial court, and in the Ninth Circuit Court of Appeals that, even in the absence of opposition to a summary judgment motion, the court must determine the motion for summary judgment based on the pleadings, records and files in the case. Both the district court and the Ninth Circuit Court of Appeals refused to determine the motion for summary judgment based on the pleadings, records and files in the case, but threw Petitioner out of court because his counsel failed to file opposition on time. Neither the district court nor the Ninth Circuit Court of Appeals considered the substantive merits of Petitioner's case in the trial court. Petitioner's entire action, without consideration on its merits, was dismissed as apparent punishment of counsel for failure to file timely opposition.

(a) Summary judgment cannot be granted by "consent"

A party opposing a summary judgment which is defective on its face by reason of the demonstration of a triable issue of fact, need not file any opposition papers whatsoever, and the failure to file opposition cannot be deemed consent to the granting of the motion. A summary judgment may be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in *Rule* 56(c), is satisfied (*Celotex Corporation v. Catrett*. 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986).) Summary judgment may only be entered where the pleadings, depositions, answers to interrogatories, admissions on file, together with affidavits, if any, show the absence of a genuine issue of material fact. (Id.) The evidence of the nonmovant in summary judgment cases is to be believed, and all justifiable inferences are to be drawn in his favor. (*Adickes v. S. H. Kress & Company*, 398 U.S. 144, 158-159, 90 S.Ct. 1598, 26 L. Ed.2d 142 (1970).)

The Ninth Circuit Court of Appeals' memorandum decision ignores applicable ninth circuit precedent. Specifically, in *Hamilton v. Keystone Tankship Corporation*, 539 F.2d 684 (9th Cir. 1976), the court cast doubt on the application of a local rule similar to Local Rule

7.9. The court stated:

> "Because of our interpretation of Local Rule 3 we need not reach the issue, but it is highly questionable in light of the standards of Rule 56 that a local rule can mandate the granting of summary judgment for the movant based on a failure to file opposing papers where the movant's papers are themselves insufficient to support a motion for summary judgment or on their face reveal a genuine issue of material fact."

(*Hamilton*, supra, 539 F.2d 684, , fn.1; see also, *Island Equipment Land Co. v. Guam Economic Development Authority*, 474 F.2d 753 (9th Cir. 1973).)

In *Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d 620, 625(9th Cir. 1977), the ninth circuit again stated that Local Rule 3, the predecessor to Local Rule 7.9, could not form the basis for grant of summary judgment, even in the absence of opposition. (See also, *Wang v. Lake Maxinhall Estates, Inc.* 531 F.2d 832, 835 fn. 10 (7th Cir. 1976) (Stevens, J.); and, see *Carlsberg v. Gatzek*, 442 F.Supp. 813, 818 fn. 3 (C.D. Cal 1977) [noting criticism of predecessor local rule as "being inconsistent" with Rule 56, citing *Mutual Fund* and *Hamilton*]; and *John v. State of Louisiana*, 757 F.2d 698, 709 (5th Cir. 1985), and cases there cited [automatic grant of summary judgment for violation of local rule, reversed; *Rule* 56 motion dispositive of litigation cannot be granted simply because of a failure to respond].)

Petitioner may not be "punished" for filing late opposition to a summary judgment motion, by having his case dismissed and then, on appeal, be deprived of the right to review on the merits of the case. On review, a district court's grant of summary judgment is to be reviewed de novo (*Pubali Bank v. City National Bank*, 777 F. 2d 1340 (9th Cir. 1985)), but here there has been no such review. Whether the trial court abused its discretion by refusing to consider the late filed papers cannot be examined in the abstract, but on the entire record especially where a less restrictive sanction than dismissal or summary judgment could have been considered. (See *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951 (4th Cir. 1987).)

(b) The court failed to consider the public policy underlying Rule 55 governing default judgments

In its memorandum decision, the Ninth Circuit Court of Appeals indicated its belief that Local Rule 7.9 "seems entirely in harmony with the default provisions of *Rule* 55 governing default judgments." (Appendix at p. 3a.) However, the court completely failed to consider the public policy underlying *Rule* 55 in an examination of the fairness of the application of Rule 7.9 in this instance. In *Butner v. Neustadter*, 324 F.2d 783 (9th Cir. 1963), the Ninth Circuit twenty nine years ago pointed out that the policy of the law is to bring about trials on the merits wherever possible; that any doubt which may exist should be resolved in favor of setting aside a default, to the end of securing a trial on the merits; that denials of a request to set aside default are scanned more carefully, so that, wherever possible, cases may be heard on their merits. (See also, *Patapoff v. Vollstedt's Inc.*, 267 F. 2d 863, (9th Cir.1959).)

When a moving party has a meritorious defense, and timely relief is sought from a default judgment, any doubt should be resolved in favor of a motion to set aside the judgment so that cases may be decided on their merits. (*Schwab v. Bullock's Inc.*, 508 F.2d 353 (9th Cir. 1975); see also, *Butner v. Neustadter*, supra, 324 F.2d 783, 786.)

In *Hibernia National Bank v. Administration Central Sociedad Anonima, et al.*, 776 F.2d 1277 (5th Cir.1985), the Fifth Circuit Court of Appeals considered this exact issue. The district judge in *Hibernia* refused to consider the substantive merits of a defense to a motion for summary judgment because of violation of local rules. The court of appeals reversed, holding that summary judgment cannot be granted simply because there is no opposition, even if the failure to oppose the motion violated a local rule. In *Hibernia Bank* the court applied the same factors typically used under *Federal Rules of Civil Procedure, Rule* 60(b) (1), the standard usually considered in determining the question whether to set aside a default judgment. The *Hibernia Bank* court found a clear analogy to a default. The three factors are, the extent of prejudice to the party in whose favor judgment is entered; the merits of the asserted defense; and the culpability of the defaulting party's conduct.

If there is a clear analogy to default judgments under

Rule 55, then Petitioner should be afforded the benefit of an even handed application of the public policy underlying *Rules* 55 and 60 insofar as they favor trial on the merits, and require a thorough examination of the merits of the asserted defense (here, to the summary judgment motion), so that the fundamental notions of fairness which underly our system of jurisprudence, can be applied evenhandedly.

The Ninth Circuit Court of Appeals' memorandum decision affirming the trial court's decision to grant summary judgment conflicts with decisions rendered in the Ninth Circuit Court of Appeals itself (*Hamilton, Island Equipment and Mutual Fund Investors*), as well as with decisions in the Seventh Circuit Court of Appeals (*Wang*) and the Fifth Circuit Court of Appeals (*John v. State of Louisiana*). The Ninth Circuit Court of Appeals' decision affirming the summary judgment is also a significant departure from clear holdings of this court (*Celotex, Adickes and Anderson v. Liberty Lobby, Inc*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d, 202 (1986). The Ninth Circuit Court of Appeals' departure from established summary judgment procedures calls for an exercise of this Court's power of supervision. The Ninth Circuit's memorandum decision in this case conflicts with applicable decisions of this Court (*Celotex, Anderson*), a special and important reason for granting the writ in this instance. A party simply cannot be denied consideration of his case on the merits in the district court of the United States because counsel defaulted in the timely filing of opposition to a motion for summary judgment. The result in the trial court and in the Ninth Circuit Court of Appeals flies in the face of traditional notions of substantial justice and fair play.

Petitioner requests in this Petition that this Court answer the important question whether a party may suffer summary judgment against him where his counsel can show valid and legitimate excuse for failure to timely file opposition to a motion for summary judgment.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and memorandum decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
DEC 13, 1991

RICHARD M. PACHULSKI, Plaintiff-Appellant, v. TOPA THRIFT & LOAN ASSN., RICHARD D. YOUNG; GARY BARNES; KURT MANN, et al Defendants - Appellees.	)	No. 90-55283, D.C. No. CV-88-6335-RB
RICHARD M. PACHULSKI, Plaintiff-Appellant, v. TOPA THRIFT & LOAN ASSN.; PEOPLES INVESTMENT AND LOAN ASSOCIATION, Defendants - Appellees.	)	No. 90-55686, D.C. No. CV-88-6335-RB MEMORANDUM *

Appeal from the United States District Court
for the Central District of California
Robert C. Bonner, District Judge, Presiding

Submitted July 9, 1991 **

Before: POOLE, KOZINSKI, and LEAVY, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

I. OVERVIEW

This case was brought in bankruptcy court as an adversary claim by a trustee in bankruptcy against an institutional lender. The bankruptcy court referred the case to the district court for jury trial. The case arose in connection with a construction loan made by Topa Thrift & Loan Assn. (TOPA) to the debtor, Douglas D. Gross (Gross), on June 22,1982. Gross, after defaulting on the loan, filed a Chapter 11 bankruptcy petition on October 5, 1983. The trustee, Richard M. Pachulski (Pachulski), sued TOPA claiming a breach of fiduciary duty, the duty of good faith and fair dealing, fraud, RICO violations, conspiracy, and cancellation of a trustee's deed.

TOPA filed a motion for summary judgment. Pachulski failed to file a timely response, and the district court granted TOPA's motion for summary judgment. Pachulski then brought a motion to vacate the judgment, which the district court denied. Pachulski now appeals the judgment and denial of his motion to vacate the judgment. We affirm.

II. STANDARD OF REVIEW

We review de novo the district court's grant of TOPA's motion for summary judgment. Pubali Bank v. City National Bank, 777 F. 2d 1340, 1342 (9th Cir. 1985). We review the district court's decision to disregard appellant's late filed opposition to summary judgment motion for a abuse of discretion. Carpenter v. Universal Star Shipping, S.A., 924 F. 2d 1539, 1547 (9th Cir. 1991). We also review the district court's denial of appellant's motion to vacate summary judgment for an abuse of discretion.

Stevens v. ITT Systems, Inc., 868 F.2d 1040, 1041 (9th Cir. 1989).

III. DISCUSSION

A. TOPA's Motion For Summary Judgment

Pachulski contends the district court erred in relying on Local Rule 7.9 in granting TOPA's motion for summary judgment. That rule reads in relevant part: "[p]apers not timely filed by a party . . . will not be considered and may be deemed by the Court consent to the granting or denial of the motion". Pachulski argues, on a variety of grounds, that even in the absence of opposition, the court must determine the motion for summary judgment based on the pleadings, records and files in the case.

The district courts have the authority, however, to make local rules "not inconsistent" with the federal rules of civil procedure. Fed. R. Civ. P. 83. We fail to see how this local rule is inconsistent with the federal rules - - indeed, it seems entirely in harmony with the default provisions of Rule 55 governing default judgments.

In this case, appellant's counsel sought and was granted six additional weeks to file his opposition papers. Despite full knowledge of the court-ordered deadline, he failed to request an extension before the time expired. The district court thus did not abuse its discretion in deeming appellant's failure to file an opposition within the allotted time as consent to the granting of the motion for summary judgment. Cf. Yusov v. Yusuf, 892 F.2d 784, 7878 (9th Cir. 1989).

For the same reason, we hold that the district court did not abuse its discretion in disregarding appellant's opposition to TOPA's motion for summary judgment. [1]

B. Pachulski's Motion To Vacate Judgment

Pachulski also contends that the district court erred in not granting his motion to vacate the order granting summary judgment on the grounds of excusable neglect under Fed. R. Civ. P. 60(b)(1). The district court, however, found that appellant's attorney's delay in filing the opposition was not excusable. That finding is amply supported by the record, and is not clearly erroneous. Furthermore, even if excusable neglect were found, the district court has discretion whether or not to relieve a party from an order. See Smith v. Stone, 308 F.2d 15, 18 (9th Cir. 1962) (finding no abuse of discretion on facts similar to those in this case).

IV. SANCTIONS

TOPA contends that Pachulski should be required to pay attorney's fees and/or cost on appeal. Fed. R. App. P. 38 gives this court discretion to assess such damages as a sanction against bringing a frivolous appeal. An appeal is considered frivolous in this circuit when the result is obvious, or the appellant's arguments of the error are wholly without merit. Jaeger v. Canadian Bank of Commerce, 327 F.2d 743, 746 (9th Cir. 1964);

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[1]Both parties have devoted considerable space in their briefs to arguing whether the district court actually granted the summary judgment motion on the merits. Because we uphold the trial court's reliance on Local Rule 7.9 we need not address this issue.

Libby, McNeill, and Libby v. City National Bank, 592 F.2d 504, 514 (9th Cir. 1978); McConnell v. Critchlow, 661 F.2d 116, 118 (9th Cir. 1981).

The arguments advanced by Pachulski on this appeal do not seem wholly without merit nor was the end result obvious. Since the appeal was not completely frivolous, there is no basis for an award of attorney's fees.

AFFIRMED. Sanctions DENIED.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 19, 1992

RICHARD M. PACHULSKI, Plaintiff-Appellant, v. TOPA THRIFT & LOAN ASSN., RICHARD D. YOUNG; GARY BARNES; KURT MANN, et al Defendants - Appellees.	)	No. 90-55283, D.C. No. CV-88-6335-RB
RICHARD M. PACHULSKI, Plaintiff-Appellant, v. TOPA THRIFT & LOAN ASSN.; PEOPLES INVESTMENT AND LOAN ASSOCIATION, Defendants - Appellees.	)	No. 90-55686, D.C. No. CV-88-6335-RB ORDER

Before: POOLE, KOZINSKI, and LEAVY, Circuit Judges.

Appellant's petition for rehearing is Denied.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 56 (c)

(C) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 60 (B).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the

finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis , audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

LOCAL RULES OF THE U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Rule 7.9 Failure to File Required Papers.

Papers not timely filed by a party including any memoranda or other papers required to be filed under this rule will not be considered and may be deemed by the Court consent to the granting or denial of the motion, as the case may be.

Rule 7.14.2 *Statement of Genuine Issues of Material Fact by Opposing Party.* Any party who opposed the motion shall serve and file with his opposing papers a separate document containing a concise "Statement of Genuine Issues" setting forth all material facts as to which it is contended there exist a genuine issue necessary to be litigated.

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JAN 11, 1990

RICHARD M. PACHULSKI,

Plaintiff,

v.

TOPA THRIFT AND LOAN ASSOCIATION, et al.,

Defendants

No. CV 88-6335 RB

ORDER GRANTING SUMMARY JUDGMENT

By Order of January 4, 1990, the Court denied Plaintiff's ex parte application to late-file opposition to defendants' motion for summary judgment. By the same Order, the Court vacated the hearing of defendants' motion for summary judgment, and took the summary judgment motion under submission. As explained below, the Court, pursuant to Local Rule 7.9, deems plaintiff to have consented to the granting of defendants' summary judgment motion and on that basis, grants defendants' motion. Accordingly, judgment will be entered in favor of the defendants.

Preliminarily, the Court notes that this lawsuit was originally filed as an adversary action in Chapter 7 bankruptcy proceeding in April 1985. In October 1986, defendant Top Thrift and Loan Association ("TOPA") made a motion to dismiss, or, in the alternative, for abstention, which plaintiff, Richard M. Pachulski, opposed. Since that time, the record shows that plaintiff failed to diligently prosecute the case. Indeed there had been no activity in this action until July 31, 1989 when a hearing on the 1986 motion to dismiss was held. Pursuant to the hearing, Plaintiff dismissed the fourth and fifth caused of action for violation of Racketeering Influenced and Corrupt Organization statute and conspiracy and dismissed all the individual defendants.

On November 13, 1989, defendants Topa and Peoples Investment and Loan Association filed the instant Motion for Summary Judgment noticing their motion for hearing on December 4, 1989. Plaintiff's counsel shortly thereafter filed an ex parte application to continue the hearing date. Defendants' counsel stipulated to an Order entered by this Court on November 16, 1989. The November 16 Order continued the hearing to January 16, 1990 and specifically directed that the "Plaintiff shall file and serve by hand memoranda, declarations and any other opposition not later than December 26, 1989." See Order captioned as Stipulation of the Parties Continuing the Hearing on Motion for Summary Judgment, Time for Filing Opposition and Reply Papers, Pre-Trial and Trial Dates and Order Thereon, at page 2.

Plaintiff's counsel was served with the Defendants' moving papers on November 13, 1989. Therefore, by the Court's computation of time, plaintiff was afforded at least six weeks , until December 26, 1989, within which to file timely opposition papers.

The due date for plaintiff's opposition papers, ordered December 26, 1989, came and passed, no opposition papers having been filed with the Court..On December 27, 1989, Plaintiff's counsel submitted an ex parte application to extend time to file his opposition to defendants' motion for summary judgment to December 29, 1989.

Based on representations made in plaintiff's December 27, 1989 ex parte application, plaintiff's counsel, Louis G. Fazzi, declares that he was able to research, prepare. and file summary judgment opposition briefs in at least several other matters between December 8 to December 26, 1989. He did not get around to lodging opposition papers in the instant action until January 2, 1990.

After considering plaintiff's application and the opposition of defendants, the Court denied plaintiff's application because good cause had not been shown. Not only had good cause not been shown for extending time to file opposition papers., the application itself was not filed before the date by which opposition was due, as required by Local Rue 7.9. See Order Denying Ex Parte Application entered January 4, 1990. By its January 4 Order, the

Court also directed that the hearing on defendants' summary judgment motion, scheduled for January 16, 1990, be taken off calendar.

Federal Rule of Civil Procedure 83 empowers the District Court to adopt local rules requiring the opposing party to file briefs within a specified time period between the service of the summary judgment motion and the date set for hearing. See 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, section 2719 at 12-13 (2d ed. 1983). Local Rule 7.9 provides:

PAPERS NOT TIMELY FILED BY A PARTY INCLUDING ANY MEMORANDA OR OTHER PAPERS REQUIRED TO BE FILED UNDER THIS RULE WILL NOT BE CONSIDERED AND MAY BE DEEMED BY THE COURT CONSENT TO GRANTING OR DENIAL OF THE MOTION, AS THE CASE MAY BE."

As noted in Pfeil v. Rogers, 757 F2d 850, 858 (7th Cir. 1985), "[R]equiring strict compliance with the local summary judgment rule--specifying that all material must be filed in accordance with the district court's scheduling order--furthers the purpose of properly framing the issues in allowing the moving party to respond to all of the resisting party's arguments in its reply brief as well as allowing the trial court to organize and control its calendar in an orderly manner."

In the case at bar, there can be no doubt that the plaintiff knew he was required to file an opposition brief with the Court no

later than December 26,1989. Indeed, the Order extending the briefing schedule and continuing the hearing on the summary judgment motion by six weeks was granted precisely to accommodate plaintiff's counsel. Furthermore, defendant's counsel offered to stipulate to the Order continuing the hearing on the condition that plaintiff's opposition would be filed no later than December 26, 1989 in order to provide defendants sufficient time in which to prepare and submit reply papers that would be meaningful to this Court.

The record reveals that plaintiff finally lodged an untimely opposition on January 2, 1990. The Court will not consider the late-filed opposition and deems plaintiff to have consented to granting of defendants' motion. See Local rule 7.9. The Court's decision to disregard the opposition lodged after a reasonable filing deadline is necessary in order to preserve the moving party's right to respond to the plaintiff's arguments and to consider the summary judgment motion in a timely fashion. In the case at bar, the Court granted plaintiff's counsel an extension of six weeks as ample opportunity to prepare opposition papers, and an allowance of time appreciably in excess of the length of time for filing opposition papers provided under Local Rule 7.6. Under these circumstances, the failure to file timely opposition, or even a timely application to extend time, prejudiced the defendants opportunity to file a meaningful reply, would result in a disruption of the Court's orderly law and motion calendar, and is

inexcusable.

On January 8, 1990, after receiving the Court's January 4, 1990 Order denying his ex parte application to extend time, counsel for plaintiff filed a second ex parte application to enlarge time and to permit his opposition papers to be considered. In this application, plaintiff's counsel offers some reasons why he was not able to attend to the preparation of opposition papers during the days of December 25 and 26, 1989, According to his declaration, he was ill. Plaintiff's counsel again advises that he was engaged in preparing opposition for other matters during December. It is evident that counsel for plaintiff - - although he had been served defendants' moving papers by the second week in November - - waited until the very last day before he did anything about preparing the opposition papers. Even then, he did not file opposition until January 2, 1990. When he finally filed opposition papers, they violated the 35-page limitation which governs the length of the pre-trial briefs. See Local Rule 3.10. The combined length of plaintiff's statement of facts and points and authorities is a whopping 58 pages, exclusive of the statement of genuine issues, declarations, indices, exhibits, and objections to evidence. Plaintiff's counsel never sought nor obtained leave of the Court to permit the filing of such an oversized brief, and for this additional reason, the Court will not consider it.

Given all of the circumstances, the neglect in late filing

oversized opposition papers cannot be deemed excusable neglect. It is neglect that could have been avoided with a minimal effort of diligence and attention to court-ordered due dates and the Local Rules of the Court. Accordingly, plaintiff's ex parte application filed January 8, 1990 is denied.

For the foregoing reasons, defendants' motion for summary judgment is granted.

Counsel for defendants are directed to prepare and lodge a proposed Judgment consistent with this Order within ten (10) days.

IT IS SO ORDERED.

DATED: January 11, 1990

ROBERT C. BONNER
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 1 1992
CLERK OF THE COURT

No. 91-2030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RICHARD M. PACHULSKI,

Petitioner,

v.

TOPA THRIFT AND LOAN ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I.

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

Respondent Topa Thrift and Loan Association ("Topa") proposes this Statement of Questions Presented for Review, since Topa does not consider the Questions Presented by Petitioner to concisely and accurately state the scope of such issues.

1. Did the District Court abuse its discretion in disregarding Petitioner's late-filed Opposition to Summary Judgment motion, which was filed one week after a Court ordered deadline, which had previously been extended six weeks for the convenience of Petitioner's counsel?

2. Did the District Court have the power to disregard Petitioner's late-filed Opposition to Topa's Motion for Summary Judgment, and to deem Petitioner to have consented to the granting of summary judgment pursuant to the Local Court Rules, after making a determination that the moving summary judgment papers established the non-existence of any triable issues of material fact?

3. (i) Did the District Court fail to consider whether Topa's moving papers on summary judgment proved the non-existence of a material, genuine issue of

fact; and (ii) if the District Court failed to consider whether a genuine material issue of fact existed, was Petitioner thereby denied the right to a jury trial by the grant of summary judgment in Topa's favor?

4. Did the District Court abuse its discretion in denying Petitioner's Motion to Vacate the Judgment of the District Court on Topa's Motion for Summary Judgment?

II.

STATEMENT OF THE CASE

A. Nature of the Case.

This case was brought in Bankruptcy Court as an adversary claim by Petitioner Richard M. Pachulski ("Pachulski"), the trustee in bankruptcy, against an institutional lender and various employees thereof, for breach of fiduciary duty, breach of the duty of good faith and fair dealing, fraud, RICO violations, conspiracy and cancellation of a trustee's deed. The case arose in connection with a construction loan made by Topa to the debtor, Douglas D. Gross ("Gross"). Gross claimed that Topa had fraudulently induced him to enter into the construction loan contract, and then had mismanaged the loan, causing him damages and ultimately the loss of the real property which he had pledged as security for the loan. Topa asserted that it did not defraud Gross or mismanage the loan, and that it had no duty owed to Gross which it breached.

Topa filed a Motion for Summary Judgment. Pursuant to the request of plaintiff Richard M. Pachulski ("Pachulski"), the parties entered into a Stipulation and the Court ordered that Pachulski was granted a 42 day extension of time to respond to the Motion for Summary Judgment. Despite this extension, Pachulski still failed to file a timely response to Topa's Motion. After Topa obtained a summary judgment in its favor, Pachulski brought a Motion to Vacate the Judgment under F.R.Civ.P.60(b). Pachulski now appeals the Judgment and denial of his Motion to Vacate the Judgment.

B. Statement of Facts.

On April 23, 1985, Pachulski filed a Complaint as an adversary proceeding in Bankruptcy No. LA-83-18098-BR. (CDN-1)[1] A notice of pending action regarding certain real estate known as 606 South Plymouth Boulevard, Los Angeles, California was recorded on April 24, 1985. Service of this first Summons and Complaint was ultimately quashed on August 23, 1985, and Topa obtained an order expunging the lis pendens on September 6, 1985. (CDN-11, 12) Plaintiff filed a First Amended Complaint on February 27, 1986. (CDN-15) Defendants filed a Motion to Dismiss the First Amended Complaint, Or, In the Alternative, for a More Definite Statement. (CDN-16, 17) The Motion to Dismiss was denied and the Motion for a More Definite Statement was granted on May 8, 1986. (CDN-20) Plaintiff's Second Amended Complaint and Demand for Jury Trial was filed on May

---

[1]The notation "CDN-#" refers to the District Court Clerk's Docket Number assigned to the referenced document. Here, the Complaint was assigned Clerk's Docket Number 1.

14, 1986. (CDN-21) Defendants answered the Second Amended Complaint on July 15, 1986. (CDN-22)

On October 15, 1986 defendants filed a Motion to Dismiss the Case or for Abstention. (CDN-25) The Motion came before Bankruptcy Judge Barry Russell on November 10, 1986. However, by order dated December 2, 1986, the case was remanded to the United States District Court for the Central District of California, and defendants' Motion to Dismiss or to Abstain was not ruled upon by the Bankruptcy Court. (CDN-28)

On February 6, 1987 Pachulski voluntarily dismissed all claims against defendant Kurt Mann with prejudice. (CDN-29)

Nothing transpired in this case for approximately two and a half years, until the District Court set a status conference on May 4, 1989. (CDN-32) On July 31, 1989 the District Court heard argument on defendants' Motion to Dismiss, Or, Alternatively, to Abstain. The Motion was denied by the District Court's Order of August 21, 1989. (CDN-44)

On September 11, 1989, the parties stipulated and the Court ordered that the Fourth Cause of Action of the Second Amended Complaint for RICO violations and the Fifth Cause of Action for Conspiracy be dismissed with prejudice. (CDN-46) The Court also ordered that the entire Second Amended Complaint be dismissed with prejudice against all defendants except Topa, Peoples Investment and Loan Association and Pasadena Thrift and Loan Association. (Id.)

On November 13, 1989 defendants Topa Thrift and Loan Association and People's Investment and Loan Association filed a Motion for Summary Judgment. (CDN-50) Pursuant to a Stipulated Order, for the convenience of Pachulski's counsel, the due date for Plaintiff's Opposition to Topa's motion was extended six weeks from November 20, 1989 to December 26, 1989. (CDN-55) Pachulski failed to file a timely opposition to the Motion for Summary Judgment, and filed an application to file a late opposition on December 27, 1989, after his opposition was due. (CDN-58) The record shows no attempt by Petitioner's counsel before the filing deadline to inform the Court or counsel of any difficulties he was experiencing. This application was denied. (CDN-65) Pachulski's subsequent application to enlarge time to file an opposition was also denied, and the Motion for Summary Judgment was granted on its merits on January 11, 1990. (CDN-68) Judgment was entered in favor of defendants and against Pachulski on February 6, 1990. (CDN-69 and 79; Supplemental Excerpts of Record, No. 1, pg. 26).

On December 27, 1989, the day after Petitioner's opposition was due to be filed, Petitioner submitted an Ex Parte Application to Extend Time to file an Opposition to the Motion for Summary Judgment. (CDN-58) This Application was denied on January 4, 1990. (CDN-66) On January 8, 1990, Petitioner filed a second Ex Parte Application to Enlarge Time and to permit his opposition papers to be considered. The Court found that Petitioner's counsel was able to prepare opposition papers for a number of other matters during the time period in question. (CDN-68, pp. 4-6) The Court found Petitioner's proposed opposition papers to be 58 pages

long, well in excess of the 35 page limitation of the District Court. (CDN-68, p. 6) Petitioner's counsel never sought nor obtained leave of the Court to permit the filing of over-sized papers. (Id.) On February 26, 1990, Petitioner filed a Motion to Vacate the Judgment, based on Petitioner's counsel's excusable neglect. (ER-78.1) The District Court subsequently found no inadvertence or excusable neglect, and denied plaintiff's Motion to Vacate Judgment. (CDN-79)

On February 13, 1990, Pachulski filed a Notice of Appeal of the Judgment. (CDN-75) On May 17, 1990, Pachulski filed a Notice of Appeal of the Order Denying His Motion to Vacate the Judgment. (CDN-80) These two appeals were subsequently consolidated. The Ninth Circuit Court of Appeals affirmed the District Court's actions on December 13, 1991, and denied Pachulski's Petition for Rehearing on March 19, 1992.

III.

ARGUMENT

A. Summary of Argument.

This case presents no special or important reasons for a grant of a petition for a writ of certiorari. The Ninth Circuit Court of Appeals' unpublished memorandum decision in this matter does not conflict with the decision of another United States Court of Appeals on the same matter. The Ninth Circuit has not departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. Neither

has the Ninth Circuit decided a federal question in a way which conflicts with applicable decisions of this Court.

Topa's Motion for Summary Judgment set forth facts sufficient to entitle Topa to Judgment as a matter of law. Despite Petitioner's repeated unsupported statements to the contrary, the District Court affirmatively found that Topa's moving papers disclosed no triable issues of material fact. Petitioner questions the integrity and truthfulness of the District Court by questioning its explicit pronouncements.

The District Court also properly disregarded Petitioner's late-filed opposition to Topa's Motion for Summary Judgment. Petitioner was granted a six week extension of time within which to file his opposition papers, and he failed to do so. Petitioner's counsel failed to make a showing of mistake or excusable neglect sufficient to gain relief from his failure to file timely opposition papers. Since the Court found Topa's moving papers to be legally sufficient, Petitioner's Motion to Vacate the Judgment was properly denied by the District Court.

Petitioner was granted adequate due process and equal protection under the law, and his rights to freedom of speech were not abridged by the District Court's proceedings.

Petitioner's counsel is incorrect when he states that the District Court failed to consider the merits of Topa's Motion for Summary Judgment. The District Court made specific findings to the contrary. There is therefore no basis for his Petition for a Writ of Certiorari.

B. No Special and Important Reasons Exist for the Granting of a Writ of Certiorari.

The asserted grounds for the petition for a writ of certiorari in this case involve a relatively minor procedural issue, based upon facts which are, at best, questionable. Respondent filed a motion for summary judgment in the District Court. After a substantial extension of tiem, Petitioner failed to file a timely opposition. The Motion for Summary Judgment was granted, and summary judgment entered, after the District Court reviewed the merits of the Motion for Summary Judgment and justifiably disregarded petitioner's late-filed opposition.

Rule 10.1 of the Rules of the Supreme Court outlines some of the factors considered by the Court in determining whether a petition for a writ of certiorari should be granted. Among the factors which the Court might consider, Rule 10.1(a) provides as follows:

> "(a) When the United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an

exercise this Court's power of supervision."

Section 10.1(c) provides that the court may consider a petition when an appellate court has decided a federal question in a way that conflicts with the applicable decisions of this Court.

No "special and important reasons" are presented for the grant of a writ of certiorari in this case. As petitioner's brief points out, there are a number of cases determinative of the issues presented in his petition. The facts contained in the record in this case clearly indicate that the District Court considered Topa's Motion for Summary Judgment on its merits, and determined that there were no triable issues of material fact and that Topa was entitled to summary judgment as a matter of law. The Court exercised its discretion to disregard petitioner's late-filed opposition to the summary judgment motion. This is not a novel question of law. The petition itself discloses a number of cases which have dealt with this situation. Topa concedes that the District Court was required to consider the summary judgment motion on its merits before granting it. However, the record clearly discloses that the District Court did so. In such a case, the memorandum of the Court of Appeals in this case did not conflict with any prior authority, since the motion was meritorious, and petitioner's failure to file an opposition was deemed consent to the granting of the meritorious motion.

In sum, there is no conflict created by the Court of Appeals' decision in this case, and the Court did not abuse its discretion in affirming the proper decision of

the District Court. There was no departure from the accepted and usual course of judicial proceedings in the Appellate Court or the District Court. Grant of a writ of certiorari is not appropriate in such circumstances.

C. The Court Found that Topa's Motion for Summary Judgment was Legally Sufficient and Disclosed No Issues of Material Fact.

Petitioner bases much of his argument on the proposition that the District Court failed to properly consider Topa's Motion for Summary Judgment, thereby granting a summary judgment solely on the basis of a default by Petitioner. Were this true, Petitioner could argue that he is entitled to have the judgment vacated and the Motion remanded to the District Court for further consideration. This proposition, however, is not true.

The record, in numerous places, makes clear that the District Court carefully considered the merits of Topa's Motion for Summary Judgment and affirmatively found that no triable issues of material fact existed. In particular, the Court stated:

> "First of all, unlike the Hamilton case, the summary judgment that was filed in this case by Topa Thrift is and was sufficient on its face.
>
> "The record should be clear that I have reviewed -- did review Topa's Motion for

> Summary Judgment. It was supported by two declarations and numerous exhibits -- about 25 exhibits, all of which appear to be properly authenticated exhibits -- along with a Statement of Uncontroverted Facts, and the Motion appears to be and appears to be at the time well-taken and meritorious. It does not raise and did not raise any triable issues of fact." (Transcript of Proceedings, March 19, 1990, p. 26, lines 5-16 [Supplemental Excerpts of Record, p. 2]) (emphasis added)

Further, the District Court, in the Judgment entered on February 8, 1990, specifically stated as follows:

> "This Court, having considered defendants' Motion for Summary Judgment, and the points and authorities, affidavits and other evidence presented in support thereof, and having found that there is no genuine issue as to any material fact in this case, and that defendants are entitled to a judgment as a matter of law,

> and having on January 11, 1990 filed an Order granting defendants' Motion for Summary Judgment. . . ." (Judgment, p. 1 [CDN-69])

Finally, the District Court, in the Order denying plaintiff's Motion to Vacate Judgment, stated that:

> "Prior to granting the Motion for Summary Judgment, the Court carefully reviewed all papers submitted by defendants in support of said Motion. Based on this review, all documents were properly authenticated and were sufficient as a matter of law for the granting of the Motion for Summary Judgment. See Hamilton v. Keystone Tankship Corp., 539 F.2d 685 (9th Cir. 1976)." (Order Denying Plaintiff's Motion to Vacate Judgment, p. 2 [CDN 79]) (emphasis added)

These citations to the record make clear that, despite Petitioner's counsel's claims to the contrary, the District Court carefully considered the merits of Topa's Motion for Summary Judgment and thereupon properly ordered judgment to be entered in Topa's favor.

D. The District Court Properly Disregarded Petitioner's Opposition.

(1) The Court Has Broad Discretionary Powers to Disregard Late-Filed Papers.

The propriety of a District Court disregarding late-filed papers in opposition to a Summary Judgment Motion has been repeatedly affirmed in recent cases. Pfeil v. Rogers, 757 F.2d 850 (7th Cir. 1985), involved a damage action in which the defendant filed a motion for summary judgment. The plaintiff attempted to file certain evidentiary documents in opposition to plaintiff's motion after the deadline for filing papers had passed. In confirming the validity of the local court rule regarding timely filing of opposition papers, the Court stated as follows:

> "Regarding strict compliance with the local summary judgment rule -- specifying that all material must be filed in accordance with the district court's scheduling order -- furthers the purpose of properly framing the issues and allowing the moving party to respond to all of the resisting party's arguments in its reply brief as well as allowing the trial court to organize and control its calendar in an

orderly manner. The filing deadline therefore assures the court not only that its decisions will be accurate because the issues will have been fully briefed and argued but also that summary judgment motions will be heard in a timely fashion." Pfeil, supra, at 857-858.

The Court then went on to affirm the District Court's refusal to consider plaintiff's late-filed opposition papers:

"Because no colorable reason was given to explain the plaintiff's failure to file his documents before the deadline, the District Court was not compelled to delay the proceeding by considering the late documents and allowing the defendants to respond. The decision to disregard all material submitted after a reasonable filing deadline is certainly not an abuse of discretion because it allowed the district court to preserve the moving party's right to respond to the resisting party's arguments and to decide the summary judgment motion in a timely

fashion. We approve the court's ruling on this issue." Id.

Davidson v. Keenan, 740 F.2d 129 (2d Cir. 1984) also dealt with the propriety of a district court's failure to consider a late-filed opposition to a summary judgment motion. In Davidson, the plaintiffs claimed that their opposition was untimely because they were unable to obtain affidavits from necessary witnesses before the deadline. The Court rejected this argument, stating that it was within the District Court's discretion to disregard a late-filed opposition when plaintiffs made no attempt to obtain an extension of time to file their opposition papers. Davidson at 132.

In Simon v. Kroger Co., 743 F.2d 1544 (11th Cir. 1984), the Court held that a defendant's motion for summary judgment was properly granted, in part because plaintiff failed to file a timely opposition to the motion. In finding that the District Court properly disregarded the opposition to the summary judgment motion, the Court held as follows:

"The district court held that Kroger was entitled to summary judgment on the secondary ground that Simon failed to respond to Kroger's motion for summary judgment until almost three months after a response was required under Local Court Rule 91.2. Simon, although filing an untimely response, did not

> seek an extension of time or leave to file his response late. The district court, therefore, concluded that Kroger's motion for summary judgment was 'unopposed,' within the meaning of Local Court Rule 91.2. Finding no opposition to Kroger's motion, the court granted the motion." Simon at 1546-1547.

(2) Petitioner's Counsel Intentionally And Consciously Disregarded A Court-Ordered Filing Deadline.

The record is clear that the filing deadline for opposition papers to Topa's Motion for Summary Judgment was extended six weeks at the request of Petitioner's counsel and for his convenience. (Stipulation, p. 2, lns. 22-28 [CDN-55]; Order Granting Summary Judgment, p. 4, ln. 25 to p. 5, ln. 6 [CDN-68]) Topa's counsel agreed to accommodate Petitioner's counsel, and the Court entered an Order based on this Stipulation. (Id.) The record shows no attempt by Petitioner's counsel to inform either the Court or Topa's counsel of any problems in meeting the Court ordered, Stipulated filing deadline. After failing to meet the filing deadline, only then did Petitioner's counsel file an Application to File Late Opposition to the Motion for Summary Judgment. (CDN-58)

Not until January 2, 1990, a week after his Opposition was due, did plaintiff submit any proposed opposition papers. (CDN-60) These papers were grossly in excess of the page limitations set by the District Court, and in violation of the Local Rules. (CDN-68, p. 6) After disregarding the Court ordered filing limits the first time, Petitioner was ordered to limit any future briefs in support of a motion to vacate the judgment to 20 pages in length. (CDN-70) Despite his previous violations, and a specific Court Order, Petitioner's counsel proceeded to file a Brief in support of his Motion to Vacate well in excess of the 20 page limit ordered by the Court. (CDN-79, pp. 3-4)

Regarding Petitioner's counsel's neglect in failing to file timely opposition papers, the District Court specifically found that Petitioner's counsel was, "able to research, prepare and file summary judgment opposition briefs in at least several other matters between December 8 through December 26, 1989. He did not get around to lodging opposition papers in the instant action until January 2, 1990." (Order Granting Summary Judgment, p. 3, lns. 13-18 [CDN-68]) Under such circumstances, the District Court properly exercised its discretion in disregarding Petitioner's late filed opposition papers.

The cited authorities make abundantly clear that it was well within the trial court's discretion to disregard these untimely papers filed in opposition to a motion for summary judgment. These cases are strikingly similar to the case at bar. Here, Petitioner's counsel was granted six additional weeks within which to file his opposition papers. This extension of time was granted for Petitioner's counsel's convenience. With full knowledge

of the Court-ordered deadline, Petitioner's counsel failed to a timely opposition to Topa's Motion for Summary Judgment, and failed to request an extension of time for good cause before the deadline had expired. Under such circumstances, the District Court properly disregarded Petitioner's opposition papers in considering Topa's Motion for Summary Judgment.

E. The District Court Properly Denied Petitioner's Motion to Vacate the Judgment; Petitioner Showed No Mistake, Inadvertence, Surprise or Excusable Neglect.

F.R.Civ.P.60(b)(1) provides, in part, that relief may be granted from a judgment or order based upon "mistake, inadvertence, surprise or excusable neglect."

(1) There Is No Authority For Reversing The District Court's Denial of Petitioner's Motion To Vacate.

As outlined, infra, numerous authorities confirm that in a case such as this, where counsel was provided adequate opportunity to respond to a motion for summary judgment, and his only excuses for failure to do so in a timely fashion were the press of other work and a few days of illness, it is within the Court's discretion to deny a motion to vacate a summary judgment based upon inadvertence or excusable neglect. Indeed, Topa has not found, nor has Petitioner cited, any authority in which an appellate court has reversed the trial court's refusal to vacate the summary judgment where opposition to a

motion for summary judgment was not timely filed, and in which the trial court granted such a motion after considering its merits.

(2) The District Court's Discretion in Denying Motions To Vacate Judgment Has Been Consistently Upheld On Appeal.

The Ninth Circuit has previously considered a situation strikingly similar to that of Petitioner herein. In Smith v. Stone, 308 F.2d 15 (9th Cir. 1962), defendants filed a motion for summary judgment, supported by points and authorities and evidence. Pursuant to the request of plaintiff's counsel, the hearing was continued twice, giving plaintiff approximately eight additional weeks to file opposition to the motion. Shortly before the continued hearing, plaintiff's counsel requested an additional continuance, claiming that he had "secretarial trouble" and that he had had the flu the previous week. No opposition was ever filed to defendant's motion for summary judgment. Smith, supra, at 16. The Appellate Court affirmed the District Court's denial of plaintiff's motion to set aside the judgment on the grounds of excusable neglect or inadvertence. The Smith Court began its analysis with the general rule that, "whether there exists a sufficient showing of inadvertence or excusable neglect is purely a matter of discretion with the trial court." Id. at 17-18. The Court went on to characterize Petitioner's claim as follows:

"Counsel for Petitioner
then states because this is an

> important case, he should be excused for his failure to file opposition to the motion to dismiss, and for summary judgment. He shows that illness had nothing to do with his prolonged failure to follow the rules of court. His vacation was more important to him than this 'important' case. He made not the slightest attempt to reach the court, or any attache thereof, at any time prior to the hearing on October 3, 1961. He has made a showing of carelessness and lack of proper regard for his duty as an attorney and an officer of the court, and no showing of inadvertence, excusable neglect, mistake, surprise, nor any one or more of them.
>
> . . .
>
> There must be some obedience to the rules of court; and some respect shown to the convenience and rights of other counsel, litigants, and the court itself." Id. at 18.

A veritable plethora of cases supports the proposition set forth in Smith, that a determination of

excusable neglect under Rule 60(b) is within the sound discretion of the trial court. The following are but a few examples of this.

Dunlap v. Transamerica Occidental Life Ins. Co., 858 F.2d 629 (11th Cir. 1988), dealt with a situation in which defendant filed a motion for summary judgment which plaintiff failed to oppose. In attempting to show excusable neglect in his failure to file an opposition, plaintiff claimed that he did not receive the scheduling order mailed by the Court, which merely set forth the requirements of the local court rule regarding filing of papers in connection with a motion for summary judgment. Dunlap at 631. In affirming the grant of summary judgment, the Court noted that the Trial Court had considered the merits of the motion for summary judgment based upon evidence in the record, and properly denied plaintiff's Motion for Reconsideration, since there was no excusable neglect in plaintiff's failure to file an opposition to defendant's motion. Id. See, also, Simon v. Kroger Co., supra, 743 F.2d 1554 (11th Cir. 1984).

Other cases specifically deal with the situation in which counsel claimed that the press of other business caused excusable neglect. In Picucci v. Town of Kittery, Maine, 101 F.R.D. 767 (D. Maine 1984), plaintiff's counsel failed to respond to defendant's motion for summary judgment because of a clerical error by his secretary, which caused him to miss the deadline. In stating that such clerical errors, along with the press of other business, did not constitute excusable neglect, the Court stated that:

> "We do not consider the fact that an attorney is busy on other matters to fall within the definition of excusable neglect. Most attorneys are busy most of the time and they must organize their work so as to be able to meet the time requirements of matters they are handling or suffer the consequences." Picucci at 768, citing Pinero Schroeder v. Fed. Nat. Mortgage Assoc., 574 F.2d 1117, 1118 (1st Cir. 1978).

In discussing the rationale for its decision, the Picucci Court used the following reasoning:

> "In effectively processing the case-load of a busy docket, it is indispensable to the court's function that counsel take responsibility to respond to the local rule's demands as a matter of routine. Such a requirement is nothing other than a rationally-based compromise between the interest of litigants and their counsel and the needs of this court to have reasonably prompt notice of contest on

> matters which require its substantive action and the administrative attention of the Office of the Clerk." Picucci at 769.

The Schroeder opinion, cited by the Picucci Court, was one of a number of cases dealing with "excusable neglect" in the context of a failure to file a timely notice of appeal. In Schroeder, Petitioner's counsel claimed that he failed to file a notice of appeal because he was busy for a period of time with other work. The Court rejected this as a basis for excusable neglect. Schroeder at 1118. See, also, Airline Pilots v. Executive Airlines, Inc., 569 F.2d 1174 (1st Cir. 1978).

The Airline Pilots and Picucci cases were based, in part, upon the rationale of Spound v. Mohasco Industries, Inc., 534 F.2d 404 (1st Cir. 1976). The Spound Court dealt with a situation in which a plaintiff, after filing a limited appeal of a judgment, sought to enlarge the substance of the appeal, thereby creating a new appeal. The Court noted that plaintiff must show "excusable neglect" in order to obtain such an enlargement of the appeal. In defining excusable neglect, the Court stated that "excusable neglect calls for 'circumstances that are unique and extraordinary.' Maryland Casualty Co. v. Conner, 382 F.2d 13, 17 (10th Cir. 1967)." Spound at 411.

In further refining this definition, the Court went on to state that:

> "If this includes a mere palpable mistake by experienced counsel, the requirement would be meaningless. We may add that, after the original appeal had been filed, the case remained in the district court only for procedures 'in aid of the appeal.' [Citation omitted] We do not believe this includes passing on a motion to enlarge its substance. Finally, the rule makes no provision for plaintiff's contention that the defendant was not prejudiced. Such an exception would be limitless." Id.

All of these cases require that "excusable" neglect must include extraordinary circumstances over which the moving party had no control. Otherwise, relief will not be granted on a motion to vacate a judgment under F.R.Civ.P.60(b). The record clearly reflects that Petitioner's counsel has made no such showing here. Petitioner's counsel claims that he was busy with other matters, that his office was closed for a number of days, and that he was ill for a few days at the end of a six-week extension specifically granted for his convenience. (CDN-67, pp. 4-7) Although these matters may show neglect, Petitioner has made no showing which would excuse such neglect. As such, under the above-cited authorities, it was well within the District Court's discretion to deny

Petitioner's motion to vacate the judgment, based upon excusable neglect in his late filing of an opposition to Topa's Motion for Summary Judgment.

The case upon which Petitioner primarily relies in asserting error in the District Court's denial of the Motion to Vacate, Hibernia National Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277 (5th Cir. 1985), is easily distinguished. The Hibernia case dealt with a situation in which the Court granted a motion for summary judgment solely based upon the fact that defendant failed to file an opposition to the motion. In Hibernia the trial court did not consider the merits of the motion. In such a case, the Hibernia Court stated that three factors must be considered: "(1) the extent of prejudice to the plaintiff; (2) the merits of the defendant's asserted defense; and (3) the culpability of defendant's conduct." Hibernia at 1280.

However, this is not the case here. Here, the District Court was entitled to disregard Petitioner's proposed opposition to Topa's Motion for Summary Judgment. Since the District Court considered the merits of Topa's Motion, it also considered defenses disclosed in Topa's papers. The District Court also made an affirmative finding that there was no excuse for Petitioner's counsel's conduct. In such a case, there is no prejudice to Petitioner as a result of these proceedings. The excusable neglect presented in the Hibernia case included excusable ignorance by plaintiff's counsel that a deadline had passed. Id. at 1280. That is not the case here. Petitioner's counsel had adequate notice of the filing deadline, which was set for his convenience.

In sum, Petitioner's counsel is a member of the Bar of the United States District Court for the Central District of California, and swore that he had read the Local Rules and would abide by them. He failed to file a timely opposition to Topa's Motion for Summary Judgment, which was then determined to be meritorious and granted. There has been no showing of excusable neglect (or for that matter any excuse) by Petitioner or his counsel, and the Motion to Vacate the Judgment was properly denied by the District Court.

VI.

CONCLUSION

For the reasons set forth above, Respondent Topa Thrift and Loan Association requests that this Court deny Petitioner Richard M. Pachulski's Petition in its entirety.

Respectfully submitted.

Dated:
September 30, 1992 By _____

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